No. 684

In the Supreme Court of the United States

OCTOBER TERM, 1954

BEN SAPIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Bryan v. *United States*, 338 U. S. 552	3, 4, 5, 6
Clyatt v. *United States*, 197 U. S. 207	3
Heald v. *United States*, 175 F. 2d 878, certiorari denied, 338 U. S. 859	5
Horne v. *United States*, 51 F. 2d 66	5
Wagner v. *United States*, 118 F. 2d 801, certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713	5
Wiborg v *United States*, 163 U. S. 632	3

Statutes and Rule:

18 U. S. C. 201	2
18 U. S. C. 641	2
28 U. S. C. 2106	2, 4
Rule 29 (a), F. R. Crim. P	3

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 534

BEN SAPIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 159, 176, Pet. App. 1-6) is reported at 216 F. 2d 722.

JURISDICTION

The judgment of the Court of Appeals as modified was entered on November 17, 1954 (R. 164, 176) and a petition for rehearing was denied on December 13, 1954 (R. 181). The petition for a writ of certiorari was filed on January 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, after reversing petitioner's conviction and ordering dismissal of the indictment for insufficiency of evidence, had the power, on consideration of government affidavits as to evidence which would be offered on a retrial, to amend its judgment by directing a new trial.

STATUTE INVOLVED

28 U. S. C. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

In the United States District Court for the District of New Mexico, petitioner was convicted and sentenced (R. 5, 10) on an indictment (R. 2–3) charging a conspiracy to defraud the United States, by a scheme to bribe an agent of the United States and to steal a truckload of aluminum ingots belonging to the government.[1] Peti-

[1] Two counts of the indictment charging the bribery (18 U. S. C. 201) and the stealing of government property (18 U. S. C. 641) were stricken before the case was submitted to the jury (R. 119, 120).

tioner moved for dismissal of the indictment at the close of the government's case and offered no evidence (R. 116–119). On appeal, the Court of Appeals ordered the indictment dismissed (R. 164), holding that there was insufficient evidence of petitioner's knowledge that the theft was from the government. After the government's motion to amend the judgment, supported by affidavits as to newly discovered evidence on the question of intent (R. 165, 166, 169–173), the court amended its judgment and ordered a new trial (R. 176). Petitioner contends that the court had no power to amend its judgment for the purpose of taking that action.

ARGUMENT

That a Court of Appeals may grant a new trial despite its conclusion that an acquittal should have been directed below, was reaffirmed by this Court in *Bryan* v. *United States*, 338 U. S. 552.[2] Therein, the Court, ruling that Rule 29 (a), F. R. Crim. P.,[3] was applicable only to the district

[2] This power had previously been exercised without question. *Wiborg* v. *United States*, 163 U. S. 632; *Clyatt* v. *United States*, 197 U. S. 207.

[3] (a) MOTION FOR JUDGMENT OF ACQUITTAL.—Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judg-

courts, held that the only criteria for the federal appellate courts are those of 28 U. S. C. 2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Petitioner attempts to distinguish his situation from *Bryan* on the ground that, unlike *Bryan*, he did not ask for a new trial in either court (Pet. 9–11). Petitioner cites no authority for his contention, and it would seem that one appealing his conviction cannot thus limit the broad discretionary powers granted the courts of appeals.

The appeal raised the issue of the validity of the trial which resulted in conviction and, after finding error, the court had the right to make such disposition of the cause as justice demanded. By seeking reversal of his conviction, petitioner waived any possible claim of double jeopardy on a new trial. *Bryan* v. *United States*, 338 U. S., at p. 560.

Petitioner also argues that this case is distinguishable from *Bryan* in that here the court consid-

---

ment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

ered evidence not already made part of the record in determining whether to remand for a new trial. He urges that the court had no power to do so. (Pet. 7, 11–12.) However, in *Bryan*, the Court of Appeals directed a new trial because the majority thought "the defect in the evidence might be supplied on another trial." (See 338 U. S. at p. 559). Manifestly, if a court may direct a new trial on the basis of supposition that additional evidence may be found, it has power to do so on affidavits showing that such evidence does in fact exist. Cases cited by petitioner, where appellate courts have ruled that they have no power to consider motions for new trial, are inapposite, since they involved a motion for new trial in the court of appeals when the case itself had not been brought up on appeal,[4] or similar motions for new trial by defendant-appellants where the courts of appeals had affirmed convictions.[5]

The disposition of the *Bryan* case shows clearly that the standard for an appellate court in determining whether to remand for a new trial is not, as petitioner argues (Pet. 7–9), the standard which governs a motion by a defendant for a new trial on the basis of newly discovered evidence.

---

[4] *Horne* v. *United States*, 51 F. 2d 66 (C. A. 4).

[5] *Heald* v. *United States*, 175 F. 2d 878 (C. A. 10), certiorari denied, 338 U. S. 859; *Wagner* v. *United States*, 118 F. 2d 801 (C. A. 9), certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713.

The standard is merely whether the interests of justice will be served by a remand for a new trial rather than for entry of judgment of acquittal. If an appellate court is of the opinion that the defect in the evidence may be corrected at a new trial, as in *Bryan* and as in this case, it may properly remand for such purpose. The direction for a new trial was therefore a proper exercise of the discretion of the Court of Appeals, and was "just" and "appropriate" in the circumstances.

CONCLUSION

For the reasons given it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

FEBRUARY 1955.